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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. TYLER RICHARD JOHNSTON, Defendant and Appellant.	A158870 (Alameda County Super. Ct. No. H58341)

After defendant Tyler Richard Johnston was charged with murder and numerous prior prison term enhancements, he pled no contest to voluntary manslaughter and admitted prior prison enhancements. Pursuant to Penal Code section 1170.95,[1] he subsequently sought re-sentencing, which the trial court summarily denied. He appeals, claiming a charge of murder, as opposed to a conviction of murder, suffices to support a petition for resentencing. We agree with the growing number of Courts of Appeal that have uniformly rejected this assertion, and therefore affirm.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

DISCUSSION

A. Senate Bill 1437 and Section 1170.95

"Effective January 1, 2019, Senate Bill 1437 [(2017–2018 Reg. Sess.)] amended murder liability under the felony-murder and natural and probable consequences theories. The bill redefined malice under section 188 to require that the principal acted with malice aforethought. Now, '[m]alice shall not be imputed to a person based solely on his or her participation in a crime.' (§ 188, subd. (a)(3).)" (*People v. Turner* (2020) 45 Cal.App.5th 428, 433 (*Turner*).) The bill also amended section 189 to provide that a defendant who was not the actual killer and did not have an intent to kill is not liable for felony murder unless he or she "was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2." (§ 189, subd. (e)(3); see *Turner*, at p. 433.)

Senate Bill No. 1437 (2017–2018 Reg. Sess.) also enacted section 1170.95, which authorizes "[a] person convicted of felony murder or murder under a natural and probable consequences theory [to] file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts" so long as three conditions are met: "(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder

following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder. [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subd. (a)(1)–(3).) Any petition that fails to make "a prima facie showing that the petitioner falls within the provisions of [section 1170.95]" may be denied without a hearing. (*Id.*, subds. (c), (d); see *Turner*, *supra*, 45 Cal.App.5th at pp. 432–434.)

B. Section 1170.95 Does Not Apply to Defendants Convicted of Voluntary Manslaughter

In his petition for resentencing, defendant alleged he was charged by information with first degree murder in violation of section 187 for a murder occurring during a burglary. He further alleged he pled no contest to voluntary manslaughter, in lieu of going to trial, because he believed he could have been convicted of first or second degree murder pursuant to the felony murder rule.

Section 1170.95 allows "[a] person *convicted of felony murder or murder under a natural and probable consequences theory*" to file a petition "to have the petitioner's *murder conviction* vacated." (§ 1170.95, subd. (a), italics added.) Should the superior court find the petitioner has made a prima facie showing of entitlement to relief and issue an order to show cause (*id.*, subd. (c)), it "shall hold a hearing to determine whether to vacate the *murder conviction* and to recall the sentence" (*id.*, subd. (d)(1), italics added), unless the parties "waive a resentencing hearing and stipulate that the petitioner is eligible

to have his or her *murder conviction* vacated." (*Id*., subd. (d)(2), italics added.)

Relying on the italicized language above, the First, Second and Fourth District Courts of Appeal have uniformly concluded a person convicted of manslaughter is not entitled to relief under section 1170.95's plain terms. (*People v. Paige* (2020) 51 Cal.App.5th 194, 201 (*Paige*); *People v. Sanchez* (2020) 48 Cal.App.5th 914, 917 (*Sanchez*); *Turner, supra,* 45 Cal.App.5th at p. 432; *People v. Flores* (2020) 44 Cal.App.5th 985, 993 (*Flores*); *People v. Cervantes* (2020) 44 Cal.App.5th 884, 887.) We agree with the reasoning of these cases and therefore need not, and do not, recite it at length.

Defendant focuses on section 1170.95, subdivision (a)(2), which states one of the requirements for relief is that "[t]he petitioner was convicted of first degree or second degree murder following a trial or *accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder*." (Italics added.) Since the italicized language does not expressly require a defendant to have accepted a plea offer for murder, he urges it must be interpreted in his favor and as applying to defendants who plead to voluntary manslaughter to avoid being tried for murder based on a theory Senate Bill No. 1437 (2017–2018 Reg. Sess.) abolished.

However, defendant places "outsized importance on a single clause to the exclusion of the provision's other language. . . . [T]he remaining portions of section 1170.95 repeatedly and exclusively refer to murder, not manslaughter." (*Flores, supra,*

44 Cal.App.5th at p. 995; see *Paige, supra,* 51 Cal.App.5th at p. 202 ["read in the context of the statute as a whole, considering both its structure and its language, subdivision (a)(2) cannot reasonably be understood to encompass persons who accept a plea offer in lieu of trial for a crime other than murder"]; *Turner, supra,* 45 Cal.App.4th at p. 436 [such an interpretation "ignores the introductory language in . . . subdivision (a) that limits petitions to persons 'convicted of . . . murder.' "].)

"Also relevant are section 1170.95, subdivision (d)(1), which refers to the court determining 'whether to vacate the murder conviction,' and section 1170.95, subdivision (d)(2), which allows the parties to stipulate 'that the petitioner is eligible to have his or her murder conviction vacated.' These provisions also expressly limit their application to murder convictions, and neither they nor any other part of the statute address granting relief from a conviction of any crime other than murder. In short, we agree with *Turner* and other cases that have concluded 'the petitioning prerequisites and available relief indicate that the Legislature intended to limit relief to those convicted of *murder* under a theory of felony murder or natural-and-probable-consequences murder' and 'section 1170.95 is unambiguous and does not provide relief to persons convicted of manslaughter.' " (*Paige, supra,* 51 Cal.App.5th at p. 202, quoting *Turner*, *supra*, 45 Cal.App.5th at p. 435.)

We also reject defendant's assertion the legislative history advances his cause. This claim, at bottom, is "based on a snippet of language from the uncodified section of Senate Bill No. 1437

stating the purpose of the bill is to more equitably sentence offenders 'in accordance with their involvement in *homicides*' (Stats. 2018, ch. 1015, § 1, subd. (b), italics added), that the statute extends beyond murder. [Defendant] again focuses on one part of a larger document, here a set of legislative findings, without regard to its other provisions. But in the same uncodified section of the bill that sets forth its general purposes of fairly addressing culpability and reducing prison overcrowding caused by inequitable sentences, the Legislature also made the following findings. 'It is necessary to amend the felony murder rule and the natural and probable consequences doctrine, as it relates *to murder*, to ensure that *murder liability* is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.' (*Id.*, subd. (f), italics added.) 'Except as stated in subdivision (e) of Section 189 of the Penal Code, a conviction *for murder* requires that a person act with malice aforethought. A person's culpability for murder must be premised upon that person's own actions and subjective mens rea.' (*Id.*, subd. (g), italics added.)" (*Paige, supra,* 51 Cal.App.5th at p. 203; see *Turner, supra,* 45 Cal.App.5th at pp. 436–438.)

We further reject defendant's constitutional challenges to our conclusion and that of every other court deciding the issue, that section 1170.95 does not apply to defendants convicted of voluntary manslaughter. In fact, in *Paige, supra,* 51 Cal.App.5th at pp. 205–206 and *Sanchez, supra,* 48 Cal.App.5th at pages 920–

921, the courts rejected the same equal protection claim defendant advances here. We agree with their analyses and need not, and do not, repeat it here.

Defendant also contends our conclusion as to the scope of section 1170.95 violates "the prohibition against cruel and unusual punishment" and defendant's "right to due process of law." These claims turn on his assertion that allowing only those convicted of murder, and not lesser crimes, to avail themselves of the petitioning process is "arbitrary" and "capricious." However, as *Paige* and *Sanchez* discuss, reading the language of the statute in its entirety and in accordance with the complete legislative history, does not result in a constitutionally infirm distinction between defendants who have killed or participated in a killing. While defendant asserts this reading of the statute will "lead to blatantly unfair results and cause those who were convicted of the more serious crime to benefit from reduced sentences compared with those who were deemed less culpable even under the previous penal statutes," he overlooks the significant point that those defendants who proceeded to trial were convicted of *murder* and sentenced accordingly, whereas those defendants who pled to lesser charges were sentenced commensurately to lesser crimes. "As the court noted in *Turner*, '[t]he punishment for manslaughter is already less than that imposed for first or second degree murder, and the determinate sentencing ranges of 3, 6, or 11 years for voluntary manslaughter . . . permit a sentencing judge to make punishment commensurate with a defendant's culpability based on aggravating and mitigating

factors.' (*Turner*, [*supra,* 45 Cal.App.5th] at p. 439; see § 193, subd. (a).) Construing section 1170.95 to exclude those convicted of voluntary manslaughter by plea agreement therefore does not 'produce absurdity by undermining the Legislature's goal to calibrate punishment to culpability.' (*Turner*, at p. 439.)" (*Sanchez, supra,* 48 Cal.App.5th at pp. 919–920, fn. omitted.)

DISPOSTION

The order denying defendant's section 1170.95 petition is affirmed.

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Banke, J.

We concur:

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Humes, P.J.

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Sanchez, J.

A158870, *People v. Johnston*